404

28pgs

(22)

Supreme Court, U.S.
FILED
APR 18 2007
OFFICE OF THE CLERK

No. 06-970

IN THE

Supreme Court of the United States

SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN,

Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

ROGER M. WITTEN
SHANE T. STANSBURY
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

PRATIK A. SHAH
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DANIELLE SPINELLI
BRENT BICKLEY
KEVIN WHELAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000

Additional Counsel Listed On Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLC
1425 K Street, NW
Suite 600
Washington, D.C. 20005
(202) 682-0240

FRED WERTHEIMER
DEMOCRACY 21
1875 I Street, NW
Suite 500
Washington, D.C. 20006
(202) 429-2008

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

ALAN B. MORRISON
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9648

TREVOR POTTER
J. GERALD HEBERT
PAUL S. RYAN
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW
Suite 650
Washington, D.C. 20036
(202) 736-2200

BRADLEY S. PHILLIPS
GRANT A. DAVIS-DENNY
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100

CHARLES G. CURTIS, JR.
DAVID ANSTAETT
HELLER EHRMAN LLP
One East Main Street
Suite 201
Madison, WI 53703
(608) 663-7460

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. APPLICATION OF SECTION 203 TO WRTL'S ADVERTISEMENTS IS CONSTITUTIONAL UNDER *MCCONNELL* 2

II. SECTION 203 MAY CONSTITUTIONALLY BE APPLIED TO ADS THAT ADDRESS LEGISLATIVE ISSUES IF THOSE ADS ALSO FUNCTION AS ELECTION ADVOCACY 8

III. THE COURT SHOULD NOT CREATE A BRIGHT-LINE CONSTITUTIONAL EXEMPTION FOR "PURE ISSUE ADS" IN THIS CASE 12

IV. WRTL AND ITS AMICI HAVE OFFERED NO JUSTIFICATION FOR REVISITING *MCCONNELL*'S HOLDING THAT SECTIONS 203 AND 204 OF BCRA ARE FACIALLY CONSTITUTIONAL 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

Ashcroft v. *ACLU*, 535 U.S. 564 (2002) 15

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 7, 19

Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 16

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 19

Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 12

Brown v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) 5

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5, 16, 19

Christian Civic League of Maine, Inc. v. *FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006) 17

Eastern Railroad President Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 9

FEC v. *Beaumont*, 539 U.S. 146 (2003) 6, 7, 19

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 239 (1982) 7, 19, 20

FEC v. *National Right to Work Committee*, 459 U.S. 197 (1982) 7, 20

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 8, 9

McConnell v. *FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) 10

McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*

McCreary County v. *ACLU of Kentucky*, 545 U.S. 844 (2005) 16

New York State Club Ass'n v. *City of New York*, 487 U.S. 1 (1988) 19

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 15

United Mine Workers of America v. *Pennington*, 381 U.S. 657 (1965) 9

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *IBM*, 517 U.S. 843 (1996) 18

United States v. *Raines*, 362 U.S. 17 (1960) 12, 13, 14

Virginia v. *Hicks*, 539 U.S. 113 (2003) 19

STATUTES AND REGULATIONS

2 U.S.C. § 431 ..... 12, 14

2 U.S.C. § 434 ..... 12, 14

2 U.S.C. § 441b 19

26 U.S.C. § 527 7

67 Fed. Reg. 51,131 (Aug. 7, 2002) 12

67 Fed. Reg. 65,190 (Oct. 23, 2002) 13

71 Fed. Reg. 52,295 (Sept. 5, 2006) 13, 14

MISCELLANEOUS

Detailed Comments of BCRA Sponsors Sen. John McCain et al. (Aug. 23, 2002), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf 12, 13

Holman & McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (2001) 10

Krasno & Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (2000) 10

This case presents a single, narrow question: whether three advertisements WRTL sought to broadcast just before the 2004 election are the "functional equivalent of express advocacy." *McConnell* v. *FEC*, 540 U.S. 93, 206 (2003). They are, and WRTL therefore may constitutionally be required to finance them with PAC funds. As *McConnell* recognized, ads like WRTL's—which, in the run-up to an election, criticize or praise a candidate's position on an issue, then urge the audience to contact the candidate about it—inevitably function as electioneering and are within the constitutional scope of BCRA's funding-source restrictions. *See id.* at 126-127, 206. This Court need go no further to decide this case.

The Court should reject WRTL's and its amici's requests that it create a bright-line exemption for "grassroots lobbying." WRTL's contention that the Constitution requires a sweeping carve-out to Section 203 of BCRA—permitting corporations and unions to use general treasury funds for "grassroots lobbying" ads, run just before elections, even if the ads attack a candidate's position on an issue—is squarely at odds with *McConnell*'s central holding. Moreover, it would gut Section 203 and return the election laws to their state before BCRA, when easy circumvention of an overly formalistic rule rendered the rule a virtual nullity. Nor is a bright-line constitutional exemption necessary to provide a standard for future as-applied challenges. Rather, courts should engage in the common-sense inquiry suggested in *McConnell*: if an ad is the "functional equivalent of express advocacy" for or against a candidate—and, in particular, if an ad, taken in context, promotes, attacks, supports, or opposes a candidate—applying Section 203 to it is constitutional.

As a last resort, WRTL and its amici ask this Court to overrule *McConnell*'s holding that Sections 203 and 204 of BCRA are facially constitutional. But they provide no justification for abandoning this Court's considered judgment, based on an extensive record, just three Terms ago: that those provisions are a constitutional means of furthering Congress's compelling interest in preventing corporations and unions from undermining the integrity of elections through

the "corrosive and distorting effects" of wealth "accumulated with the help of the corporate form." 540 U.S. at 205.

I. APPLICATION OF SECTION 203 TO WRTL'S ADVERTISEMENTS IS CONSTITUTIONAL UNDER *MCCONNELL*

WRTL's ads are just the sort of ads this Court identified in *McConnell* as the "functional equivalent of express advocacy" for or against a candidate. 540 U.S. at 206. Because Congress has a compelling interest in ensuring that such ads are not financed by business corporations' or unions' general treasury funds, *see id.* at 205-206, requiring WRTL to use PAC funds to broadcast its ads is constitutional.

A. WRTL's radio ads denounced a "group of Senators" who had been "using the filibuster delay tactic to block federal judicial nominees," "causing gridlock and backing up some of our courts to a state of emergency." JS App. 59a, 61a. Its television ad similarly rebuked "a group of U.S. Senators" for "blocking qualified nominees" and "causing gridlock." *Id.* at 62a. All the ads exhorted the audience to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* at 59a, 61a, 62a. It was a matter of public record that Feingold was part of the "group of Senators" who had filibustered judicial nominees, and whom the ads criticized. And all the ads concluded with the instruction to "visit BeFair.org," *id.*, a website that contained press releases and "e-alerts" attacking Feingold by name for his role in the filibusters. *See* Intervenors' Opening Br. 27.

These facts are sufficient to decide this case. As *McConnell* recognized, ads like WRTL's—which, in the immediate pre-election period, criticize or praise a candidate's position on an issue and urge the audience to contact the candidate about it—are precisely the kind of ads at which Section 203 was aimed, and to which its funding-source restrictions may constitutionally be applied. As this Court explained: "Little difference exist[s] ... between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. Such an ad is the "functional equivalent of express advocacy"

against Jane Doe, *id.* at 206—even though it focuses on an issue and does not expressly mention Jane Doe's candidacy or attack her fitness for office—because it criticizes her record and thus effectively urges that she not be reelected.[1]

The only arguable difference between WRTL's ads and the "Jane Doe" ad is that WRTL's ads did not expressly say that Senator Feingold was among the "group of Senators" they denounced. But that circumlocution does not make application of Section 203 unconstitutional. There was no ambiguity regarding the "group of Senators" the ads attacked: the group's membership was an objectively ascertainable fact. Because Senator Feingold was one of the group, the ads in fact criticized his record, as any reasonably informed listener would have known.[2] Indeed, even a listener who was previously unaware that Feingold had participated in the filibusters could have discerned it from the ads themselves. Their sarcastic tone, and complaints about use of a recurring procedural device that had already caused "gridlock," forcefully implicated Feingold.[3]

---

[1] WRTL claims (Br. 5) that our observation that WRTL's ads criticized Senator Feingold's position reveals "that quashing criticism is the true intent behind" Section 203. To the contrary, ads that criticize *or praise* a candidate's stance on an issue, broadcast just before an election, necessarily function as electioneering, since voters choose between candidates based in part on the candidates' positions on issues.

[2] Feingold's involvement with the filibusters had been widely reported in the local media—unsurprisingly, since both WRTL itself and Feingold's Republican opponents had publicly attacked him for it, *see, e.g.*, JA 70-74, 97-98; Intervenors' Opening Br. 24-27. A search of the LEXIS-NEXIS "Wisconsin News Publications" database reveals that at least four editorials and fifteen news articles published in major Wisconsin news sources during 2003 and 2004 linked Feingold to his support of judicial filibusters, and at least four other news articles discussed general Democratic support of the filibusters or Feingold's role in the potential selection or filibuster of judicial nominees.

[3] As the ads themselves made clear, filibusters had already occurred. Senators had either voted for them or not; and there would have been no logical reason to direct an ad opposing the filibusters at a Senator who had already declined to participate in them.

In addition, the ads expressly directed the audience to visit BeFair.org; indeed, a visit to the website was the only method the ads provided for obtaining Feingold's contact information. And BeFair.org contained material denouncing Feingold by name for "putting politics into the court system, creating gridlock, and costing taxpayers money" by participating in the filibusters. *See* Intervenors' Opening Br. 27. Any visitor to the site who might initially have been uncertain whether Feingold was one of the "group of Senators" the ads disparaged would quickly have had any confusion dispelled.

WRTL contends (Br. 58 n.68) that it is improper to examine the content of the website to which its ads expressly directed listeners, because "the FEC [cannot] combine[] different communications to create . . . electioneering communications." That contention misses the point. The BeFair.org website is not itself an "electioneering communication," but WRTL's ads unquestionably are. In evaluating whether those ads nevertheless are constitutionally exempt from BCRA's requirements, it is appropriate to consider that they not only attack a candidate's record—albeit employing the thin veil of referring to him as a member of a "group of Senators"—but also expressly direct the audience to a website that attacks him by name.

WRTL's accusation (Br. 36) that Appellants "treat[] the actual text of the communication as essentially irrelevant," "an empty vessel into which they pour discovered intent from an external context . . . beyond the speaker's control," is thus peculiarly inapt. Far from being irrelevant, the text of WRTL's ads—together with the undisputed fact that Feingold was one of the "group of Senators" the ads attacked—demonstrates that the ads are the functional equivalent of express advocacy. By ignoring the ads' real-world meaning, and examining the ads only from the perspective of the wholly "untutored viewer[]" (JS App. 15a), the district court erred.[4]

---

[4] WRTL and its amici spend many pages reiterating that application of Section 203 to WRTL must satisfy strict scrutiny, and contending (WRTL Br. 29) that Appellants have improperly attempted to "shift their strict

B. While this case can be decided based solely on the foregoing, ample additional evidence confirms the ads' electioneering nature: (1) WRTL and WRTL-PAC publicly opposed Senator Feingold's candidacy (indeed, WRTL identified "send[ing] Feingold packing" as one of its "top election priorities") and invoked the filibuster issue as a reason to remove him from office; (2) Feingold's Republican opponents made the filibusters a major campaign issue and repeatedly attacked him for participating in the filibusters; and (3) the ads at issue were aired not when any cloture vote was imminent, but only after Congress had recessed, and WRTL never sought to run them after the election. *See* Intervenors' Opening Br. 24-28.[5]

---

scrutiny burden to WRTL." Appellants have never contended that strict scrutiny is inapplicable. Here, however, this Court has already conducted strict-scrutiny analysis in upholding Section 203 on its face. Where a statute has already been upheld against a facial overbreadth challenge, and the Court has affirmed that it serves a compelling governmental interest, the plaintiff in an as-applied challenge should be required to produce evidence demonstrating that its own particular situation falls outside the range of constitutional applications identified by the Court. *See Buckley* v. *Valeo*, 424 U.S. 1, 74 (1976) (after upholding FECA's disclosure requirement on its face, noting that parties in future as-applied challenges would need to offer specific evidence demonstrating a reasonable probability that the statute's application "will subject them to threats, harassment, or reprisals"); *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99 (1982) (deciding party's as-applied challenge based on "proof of specific incidents of private and government hostility toward the [minor party] and its members"); *see also McConnell*, 540 U.S. at 173 (after upholding facial constitutionality of BCRA's restrictions on soft-money contributions to state and local party committees, noting that "as-applied challenges remain available" if "state or local parties can make . . . a showing" that the statute would effectively silence them). WRTL has failed to make such a showing here.

[5] WRTL asserts (Br. 13) that it timed its ads to coincide with "public interest" in the filibuster issue, but cites no record evidence showing that public interest in the issue was present only, or primarily, during the pre-election period. On the contrary, WRTL admits (Br. 15) that the filibusters had been publicly debated since early 2003; yet WRTL did not run its ads until *after* the last 2004 cloture vote, when the Senate had left for summer recess. And WRTL never ran the ads at issue after the election, although public debate on the issue peaked in the spring of 2005. When WRTL was last before this Court, it attributed its sudden silence on the filibusters after

WRTL does not dispute these facts, but contends (Br. 59-61) that the district court correctly refused to consider them because doing so would have amounted to an improper inquiry into WRTL's subjective intent. On the contrary, these facts are *objective* evidence demonstrating that, in the political context in which they were aired, the ads would have functioned as electioneering. They reinforce the conclusion that is necessarily drawn from the ads themselves: the audience for WRTL's ads would reasonably have understood them as criticizing Feingold—and suggesting that he was unfit for office—because of his position on an important campaign issue.[6]

C. Nor does WRTL make any plausible argument that the PAC option would have been inadequate for funding its electioneering communications. WRTL's suggestion that, as applied to it, "[t]he PAC requirement . . . is a complete ban" (Br. 35), and its repeated reference to BCRA's purported "prohibition" of its advertising (*e.g.*, Br. 5), ignore this Court's admonition that it "is simply wrong" to characterize the statute's funding-source restrictions as "a complete ban." *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003); *accord McConnell*, 540 U.S. at 204. This Court has repeatedly held that the PAC option is a constitutionally sufficient means for corporations to engage in election advocacy. That is as true for non-profit advocacy organizations that accept money from for-profit

---

the election to a change in priorities. *See* Tr. of Oral Arg. at 9-10, *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006). It now claims (Br. 16) that in the spring of 2005, the issue had shifted from the filibusters themselves to whether Senate rules should be changed to preclude them. But clearly the filibusters themselves, not merely the proposed rule change, remained an issue in the spring of 2005, when other groups spent more than $8.5 million for advertising on the issue. FEC SJ Ex. 1 at 7-8, 29-30; Ex. 7 at 18-19, 26-27.

[6] WRTL attempts (Br. 18-22) to sow confusion regarding the FEC's experts' testimony below. Although the experts acknowledged that interest groups use ads to engage in lobbying, they flatly rejected the notion that such lobbying ads cannot also function as electioneering. Indeed, the experts concluded that WRTL's ads would have influenced the election, with Bailey opining that they were "obvious . . . campaign ad[s]." JA 148-149; *see also* FEC SJ Ex. 1 at 35-36 (Franklin Report).

corporations and unions as it is for those corporations and unions themselves. *See McConnell*, 540 U.S. at 211; *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 664-665 (1990); *see also Beaumont*, 539 U.S. at 163 (upholding application of PAC requirement to contributions by non-profit group); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209-210 (1982) (*NRWC*) (same).

WRTL cannot show that its ability to use its PAC is any different from that of non-profit advocacy groups this Court has considered in the past. It argues (Br. 34) that "[w]hen a legislative issue arises on short notice, as here, there is no time for corporations without a PAC to organize one." But WRTL already had a functioning PAC in 2004, and had used it to advocate Senator Feingold's defeat in the 1992, 1998, and 2004 elections. FEC SJ Ex. 3 at 128-131; Ex. 4 at 125-126; Ex. 11; Ex. 12. And although WRTL states (Br. 35) that "the PAC alternative is untenable where there is inadequate time to raise sufficient funds by appeals to existing members," it points to no evidence that this was true in its case. Indeed, WRTL raised over $150,000 for its PAC in the 2000 election cycle. FEC SJ Ex. 10 at 2.[7] In any event, if WRTL has difficulty raising funds for its ads from its members—and must instead rely on large donations from business corporations—that in no way suggests that the funding-source restrictions are unconstitutional as applied to WRTL. The very purpose of the restrictions is to ensure that election advocacy is funded by an organization's members and reflects their willingness to contribute to such advocacy—not the greater resources that can be amassed by corporations. *See McConnell*, 540 U.S. at 205; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (*MCFL*).[8]

---

[7] WRTL contends (Br. 33-34 & n.44) that it would have had to pay taxes on any funds spent on its ads had it financed them through its PAC. That argument assumes that WRTL's ads are not electioneering. PAC funds spent for electioneering purposes are not taxable. *See* 26 U.S.C. § 527.

[8] If WRTL did not wish to use its PAC, it had other means to convey its message without contravening BCRA. *See* Intervenors' Opening Br. 29-31. WRTL does not show otherwise. It contends, for example (Br. 45), that

II. SECTION 203 MAY CONSTITUTIONALLY BE APPLIED TO ADS THAT ADDRESS LEGISLATIVE ISSUES IF THOSE ADS ALSO FUNCTION AS ELECTION ADVOCACY

WRTL contends that the Constitution prohibits restricting the use of corporate funds for *any* advertisement that constitutes "grassroots lobbying," regardless of its potential to function as electioneering. WRTL thus advocates (Br. 56-57) a sweeping constitutional carve-out to Section 203 for any ad that (1) "focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter," and (2) "does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office." If that test is met, WRTL contends (Br. 57), it is immaterial that the ad "say[s] that the public official is wrong or right on the issue," so long as it does not expressly say he is "wrong for [the] office."

That argument rests on premises this Court has already rejected. *McConnell* made clear that "the speech involved in so-called issue advocacy is [no] more core political speech than are words of express advocacy." 540 U.S. at 205. And it disavowed the notion that any sharp distinction can or should be drawn between the two categories. "[T]he First Amendment erects [no] rigid barrier between express advocacy and so-called issue advocacy." *Id.* at 193; *see also id.* at 126 ("the two categories of advertisements" are "functionally identical in important respects").[9]

---

running the ads outside the electioneering communications period would have been inadequate because "[g]rassroots lobbying is customarily done when a bill or matter . . . is directly before the Congress." That statement is irrelevant here, where WRTL sought to run its advertisements when the Senate was in recess, rather than when any cloture vote was imminent, and did not resume running the ads when debate over the issue peaked in 2005 and BCRA posed no obstacle to airing them.

[9] WRTL and its amici rely heavily on *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), to argue that corporations' ability to spend general treasury funds on "issue advocacy" is sacrosanct. But *Bellotti* was about referenda, not candidate elections, and, as the Court there explained,

The fallacy at the heart of WRTL's argument is its misunderstanding of the Court's use of the term "genuine issue ad" in *McConnell*. The Court recognized that some issue ads fitting the definition of "electioneering communication" might not function as election advocacy, and it "assume[d] that the interests that justify the regulation of campaign speech might not apply" to such "genuine issue ads." 540 U.S. at 206 n.88. But it concluded that "[f]ar from establishing that BCRA's application to pure issue ads is substantial . . . the record strongly supports the contrary conclusion." *Id.* at 207.

WRTL contends that, by thus referring to "genuine issue ads" (or "pure issue ads"), *McConnell* indicated that any ad that addresses a "genuine" legislative issue, and does not employ express advocacy, necessarily falls outside Section 203's legitimate scope. That seriously misreads *McConnell*. The Court there held that Section 203 could constitutionally be applied to "issue ads" that are the "functional equivalent of express advocacy." 540 U.S. at 206. And it endorsed the common-sense proposition that a pre-election ad saying a candidate is right or wrong on an issue is the functional equivalent of express advocacy for or against the candidate.

"a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. As *McConnell* observed, *Bellotti* thus casts no doubt on the proposition that when issue advocacy is election-related, Congress has a compelling interest in ensuring that it is not financed with corporations' general treasuries. *See* 540 U.S. at 206 & n.88.

WRTL's reliance on the *Noerr-Pennington* line of cases is inapt for a similar reason. Those cases applied the principle of constitutional avoidance to construe the Sherman Act not to forbid entities from joining forces to persuade the legislature or executive to take particular legal action that could affect their competition. *See Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 670 (1965). Like *Bellotti*, they hold that corporate speech on matters of public concern is protected by the First Amendment. They do not, however, establish a principle that the funding of corporate lobbying can never be regulated under any circumstances. *McConnell* makes plain that it can be, where—as here—the lobbying *also* functions as electioneering.

See id. at 126-127 (an ad that "condemn[s] Jane Doe's record on a particular issue" is tantamount to "urg[ing] viewers to 'vote against Jane Doe'"). Congress's compelling interest in ensuring that corporate monies do not exercise a "corrosive and distorting" effect on federal elections justifies application of BCRA's funding-source restrictions to such ads. *See id.* at 205.

WRTL relies heavily on the terminology employed in the two *Buying Time* studies that were part of the record in *McConnell*. Those studies asked respondents to review advertisements broadcast during the 1998 and 2000 election cycles. One question in the studies asked respondents to code ads as falling into one of two categories: those whose purpose was to "generate support or opposition for a particular candidate," and those whose purpose was to "provide information about or urge action on a bill or issue."[10] The studies labeled the former category "electioneering ads," and the latter "genuine issue ads."[11] WRTL contends that any ad coded in the *Buying Time* studies as a "genuine issue ad" *ipso facto* cannot function as election advocacy and must be constitutionally exempt from Section 203's reach. But the studies do not support that conclusion, and this Court in *McConnell* did not rely on them for any such proposition. As both sides in the *McConnell* litigation acknowledged, the studies did not permit participants to code an ad as falling into *both* categories—although many ads both "urge action on a bill or issue" *and* "generate support or opposition for a particular candidate."[12] Thus, the percentage of ads the studies characterized

---

[10] *See* Holman & McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 99 (2001); Krasno & Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* 193 (2000).

[11] *See McConnell* v. *FEC*, 251 F. Supp. 2d 176, 726 (D.D.C. 2003) (Kollar-Kotelly, J.) (citing Goldstein Expert Report 24-26).

[12] *See* Br. of Sen. McConnell at 55 ("The survey form provided no way for a student to conclude that an ad's 'purpose' was to do both."); Br. of Intervenor-Defendants at 69 ("[R]espondents [were asked] to identify 'the purpose' of each ad. Respondents were not allowed to answer 'both.' Yet . . . many if not most campaign ads . . . *also* discuss issues."). The issue

as "genuine issue ads" necessarily overstates the number of "issue ads" lacking an electioneering message, and the studies' labeling of an ad as a "genuine issue ad" does not mean the ad would not also function as election advocacy.

WRTL's error is thrown into sharp relief by the ad it chooses as its "gold standard" (Br. 62) for the "grassroots lobbying" ads it says corporations and unions must constitutionally be permitted to pay for with general treasury funds. That ad (which WRTL calls the "PBA ad") states, in part:

> Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [*sic*] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion.

WRTL Br. 56 n.65. To be sure, this ad addressed a current legislative issue and did not expressly mention an election or urge a vote against a candidate. But the notion that such an ad would have no "cognizable electoral effect" (WRTL Br. 57), when broadcast just before an election and targeted to the relevant electorate, is self-evidently absurd.[13] That WRTL's own "gold standard" "grassroots lobbying" ad launched an emotionally freighted attack on the record of the Senators it discussed—and thereby plainly attacked their fitness to serve in the Senate—is reason enough to reject WRTL's contentions.

---

was also remarked on at oral argument. *See* Tr. of Oral Arg. at 125, *McConnell* v. *FEC*, 540 U.S. 93 (2003) ("QUESTION: . . . [M]ost of these ads, I think everybody would agree, are hybrids. Sure, they really do address issues, and there is also a very clear implication about what they want you to do in the ballot booth.")

[13] WRTL emphasizes (Br. 7 n.11, 55-56) that the *Buying Time* coders coded the PBA ad as a "genuine issue ad." As discussed above, however, that in no way suggests that it did not *also* function as electioneering.

III. THE COURT SHOULD NOT CREATE A BRIGHT-LINE CONSTITUTIONAL EXEMPTION FOR "PURE ISSUE ADS" IN THIS CASE

It is, of course, possible that there could be ads that fall within BCRA's definition of "electioneering communication," yet do not function as election advocacy. To decide this as-applied challenge, it suffices to recognize that WRTL's ads do not fall into that category. As a rule, this Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it" or "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (citation omitted); *see also Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501-502 (1985). The Court should thus decline the invitation by WRTL and its amici to use this case to formulate a bright-line constitutional carve-out to Section 203.

As WRTL and its amici note, Congress granted the FEC the authority to create regulatory exemptions from BCRA's definition of "electioneering communication," so long as they do not permit ads that promote, attack, support, or oppose a candidate for federal office. 2 U.S.C. § 434(f)(3)(B)(iv) (citing *id.* § 431(20)(A)(iii)). In 2002, the FEC solicited comments on various proposed exemptions for issue advertising under that provision. *See* 67 Fed. Reg. 51,131, 51,144-51,145 (Aug. 7, 2002). BCRA's sponsors, including three of the Intervenors, commented, noting that the FEC had the authority to adopt a bright-line exemption for such ads, provided that "the ads exempted are 'plainly and unquestionably' 'wholly unrelated' to an election."[14] The sponsors concluded, however, that none of the proposed exemptions met that standard, and instead proposed an alternative rule.[15] After considering all the com-

---

[14] Detailed Comments of BCRA Sponsors Sen. John McCain et al. ("McCain Comments") at 8 (Aug. 23, 2002) (quoting 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays)), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

[15] The sponsors' proposed exemption would have required, among other things, that "the communication refers to the candidate only by use of the term 'Your Congressman,' 'Your Senator,' 'Your Member of Congress'

ments, the FEC decided not to adopt any exemption, including that proposed by the sponsors. It concluded that each of the proposals could permit ads that promote, attack, support, or oppose a federal candidate, in contravention of the statutory mandate. 67 Fed. Reg. 65,190, 65,201-65,202 (Oct. 23, 2002). Subsequently, in 2006, certain organizations, including several amici, petitioned the FEC to initiate a rulemaking to adopt a proposed exemption for "grassroots lobbying." The FEC declined to do so, noting the pendency of as-applied challenges to the statute by WRTL and the Christian Civic League of Maine, but stated that it "may consider initiating a rulemaking on this subject in the future." 71 Fed. Reg. 52,295, 52,295-52,296 (Sept. 5, 2006).

A number of amici now urge this Court to adopt the 2006 proposal or a similar bright-line exemption for "grassroots lobbying" as a constitutional mandate. That proposal fails to appreciate the difference between a regulatory exemption adopted by the agency charged with administering a statute and a constitutional rule imposed by a court. The former can be altered by the agency if experience reveals that it permits evasion of the statute's goals; the latter cannot be so easily revised. Moreover, this Court sits to resolve concrete disputes, not to issue abstract pronouncements on facts not before it. The Court thus ordinarily deems it "undesirable . . . to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation" so as to identify unconstitutional applications of the legislation before such cases arise. *Raines*, 362 U.S. at 21 (cita-

---

or a similar reference and does not include the name or likeness of the candidate in any form." McCain Comments at 10. That was a key feature of the proposed exemption, because "allowing the use of the candidate's name in a communication that runs within the 30 or 60 day window makes it almost impossible to assure that the communication 'plainly and unquestionably' is 'wholly unrelated' to an election." *Id.* Because WRTL's ads named Senator Feingold, they would not have satisfied the terms of the exemption. In any event, the sponsors' proposal was to create a regulatory exemption that could be rescinded if it proved to allow evasion of the statute's goals, not the immutable constitutional exemption that WRTL and its amici ask this Court to establish.

tion omitted). In the absence of facial overbreadth, "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases." *Id.* at 22. At a minimum, any attempt to articulate a constitutional carve-out to Section 203 should await a meritorious as-applied challenge.

Moreover, the exemption amici proposed to the FEC in 2006—like WRTL's proposed "grassroots lobbying" carve-out—would seriously undermine the statutory scheme, because it would permit corporations and unions to fund ads that promote, support, attack, or oppose candidates and therefore function as election advocacy. An ad that "discusses a current legislative or executive branch matter," discusses the candidate's record on the matter (even if only by quoting the candidate or reciting his or her vote on the issue), and then urges the audience to call the candidate, *see* 71 Fed. Reg. 52,295, provides ample scope for electioneering. The "Jane Doe" ad *McConnell* identified as the prototypical electioneering "issue ad," *see* 540 U.S. at 126-127, would seemingly meet this test, as would the PBA ad quoted above, *see supra* p. 11.

WRTL and its amici contend that this Court must create a bright-line rule because the ordinary mode of case-by-case adjudication is too uncertain and too burdensome. Those concerns are unwarranted. The absence of a bright-line rule to govern as-applied challenges does not render those challenges standardless. Rather, courts should apply the standard articulated in *McConnell*: Congress may constitutionally restrict corporate funding of ads that are the "functional equivalent of express advocacy" for or against a candidate. 540 U.S. at 206. That is, Section 203 constitutionally encompasses ads—regardless of their *form*—that *function* as electioneering by influencing voters' decisions. In particular, as Congress recognized in BCRA, any ad that can reasonably be understood to promote, attack, support, or oppose a candidate—even if it also urges action on an issue—necessarily functions as electioneering. *See* 2 U.S.C. § 434(f)(3)(B)(iv) (citing *id.* § 431(20)(A)(3)).

Although the district court purported to incorporate that statutory standard into its five-part "test" (JS App. 18a), its

erroneous insistence on approaching WRTL's ads in a contextual vacuum—ignoring the real-world meaning of the ads' language—led it to miss the obvious: that the ads attacked Senator Feingold's record. As this case demonstrates, that blinkered approach is fundamentally flawed. This Court recognized in *McConnell* that electioneering cannot be defined through the presence or absence of particular formal indicia. Rather, the constitutional question is whether an ad is the "*functional* equivalent of express advocacy" for or against a candidate. 540 U.S. at 206 (emphasis added). To answer that question, a court must undoubtedly start by examining the text of the ad. But it must also take into account at least the contextual evidence necessary to permit it to understand the *meaning* the ad will have to its audience.

Such an approach does not require an unmanageable inquiry into subjective intent. As explained in our opening brief (Br. 40-41), the constitutionality of applying Section 203's funding-source restrictions should turn not on the advertiser's subjective motivations, but rather on an objective examination of whether the ad will function as the equivalent of express advocacy for or against a candidate and thus implicate Congress's compelling interest in restricting corporate and union funding of such ads. In particular, courts should ask whether the ad's audience would reasonably understand the ad, in the context of the campaign, to promote or attack the candidate; such an ad, broadcast just before an election, will inevitably function as election advocacy. There is nothing unusual or improper, particularly in the context of an as-applied challenge, about such a common-sense inquiry into the *meaning* of speech.[16]

---

[16] In other contexts, courts determining whether the First Amendment permits regulation of particular speech have examined the context of the speech to determine the effect the speech will have on its hearer. *See, e.g., Ashcroft* v. *ACLU*, 535 U.S. 564, 574 (2002) (speech is proscribable obscenity when "the average person, applying contemporary community standards, would find," *inter alia*, "that the work, taken as a whole, appeals to the prurient interest") (citation omitted); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (scope of First Amendment protec-

Nor does adjudication of as-applied challenges under such a standard render the statutory scheme impermissibly vague. For that proposition, WRTL and its amici rely on *Buckley*, but there the Court's concern was the vagueness of a statute that regulated primary conduct. *See* 424 U.S. at 41-44. Here, by contrast, Section 203 employs a bright-line, easily understandable definition of "electioneering communication," and no speaker is compelled to "hedge and trim," *id.* at 43, based on uncertainty as to whether an ad falls within the statute's scope. On the contrary, would-be advertisers can readily conform their conduct to the statute: they know that any ad meeting the definition of "electioneering communication" will trigger the statute, and that they must either fund such an ad through a PAC, modify it so that it does not meet the definition of "electioneering communication," or bring an as-applied challenge. To be sure, the outcome of every as-applied challenge may not be predictable in advance; but that is simply the nature of adjudication, as opposed to legislation. Moreover, *McConnell* concluded that BCRA's bright-line definition of "electioneering communication" is constitutional in the "vast majority" of its applications. 540 U.S. at 206-207. Any area of uncertainty will thus be small. Given the existence of a statutory bright-line definition that is well-tailored to Congress' goals, there is no basis for the Court to adopt a second-tier bright-line rule to govern as-applied challenges.

Finally, WRTL and its amici have provided no reason to believe that an inflexible bright-line rule is needed because as-applied challenges decided on their facts will be so lengthy

---

tion of employer's anti-union speech must be assessed in context, "tak[ing] into account the economic dependence of the employees on their employers and the necessary tendency of the former . . . to pick up intended implications of the latter" other hearers might miss); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (a state may proscribe speech "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" in its hearers); *cf. McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 866 (2005) (whether religious display constitutes government endorsement of religion is assessed from the perspective of a "reasonable observer . . . aware of the history and context of the community and forum in which the religious display appears") (citation omitted).

and burdensome that meritorious challenges will be mooted before the ads can be broadcast. District courts decide equally complicated matters on motions for preliminary injunctions every day. If an advertiser can show a likelihood of prevailing on the merits and irreparable injury from not being able to broadcast its ad, it should be able to obtain injunctive relief permitting it to do so.[17] WRTL points out (Br. 65) that in the two as-applied challenges to Section 203 brought since *McConnell*, the plaintiffs were denied preliminary injunctions. But the failure of *meritless* as-applied challenges does not demonstrate the inadequacy of the as-applied approach.

IV. WRTL AND ITS AMICI HAVE OFFERED NO JUSTIFICATION FOR REVISITING *MCCONNELL*'S HOLDING THAT SECTIONS 203 AND 204 OF BCRA ARE FACIALLY CONSTITUTIONAL

WRTL and its amici urge this Court to overturn *McConnell*'s holding that Sections 203 and 204 of BCRA are facially constitutional. They have offered no valid reason for doing so, and *stare decisis* counsels strongly against it. "[E]ven in constitutional cases, the [*stare decisis*] doctrine carries such persuasive force that we have always required a departure from

---

[17] Contrary to WRTL's accusations of "scorched-earth litigation" tactics (Br. 66), the two cases litigated thus far demonstrate that such motions for preliminary relief need not be burdensome, discovery-intensive proceedings. WRTL filed its complaint and motion for a preliminary injunction on July 28, 2004. No discovery was conducted on that motion. The district court held a hearing on August 12, 2004, and decided the motion that same day—*before* BCRA's electioneering-communications period began on August 15. In CCLM's case, CCLM filed its complaint and motion for a preliminary injunction on April 3, 2006. A hearing was held, after very limited discovery (one deposition, nine document requests and thirteen interrogatories), on April 24, 2006, and the motion was decided on May 9, 2006—again, before the relevant electioneering-communications period began. The district court found that CCLM had not established a likelihood of success on the merits and denied preliminary relief. *See Christian Civic League of Maine, Inc.* v. *FEC*, 433 F. Supp. 2d 81, 87-90 (D.D.C. 2006). There is no reason to believe district courts considering future cases cannot likewise act promptly on motions for preliminary injunctions and take appropriate action to prevent discovery from imposing undue burden or delay.

precedent to be supported by some special justification." *United States* v. *IBM*, 517 U.S. 843, 856 (1996).

WRTL and its amici can point to no such justification. This Court upheld Sections 203 and 204 only after careful consideration of a voluminous record. To redecide those questions now in the context of an as-applied challenge, without any developed record pertinent to a facial challenge, would be unwise at best. Indeed, WRTL's primary argument—that Section 203 has proven practically unworkable—is based solely on the incorrect conclusions WRTL draws from the two as-applied challenges its counsel has brought since *McConnell*. WRTL identifies no changed circumstances of law or fact that could justify overruling *McConnell*'s considered holding, and none exist.

WRTL raises two specific arguments as to why this Court should now reverse course and strike down Section 203 on its face. *First*, it contends (Br. 62-65) that this Court was wrong in *McConnell* when it held that, "[f]ar from establishing that BCRA's application to pure issue ads is substantial . . . the record strongly supports the contrary conclusion." 540 U.S. at 207. But WRTL offers no new evidence that calls that conclusion into doubt. WRTL seems to contend that Appellants have somehow led this Court astray by arguing in *McConnell* that Section 203 would capture very few issue ads that did not function as election advocacy, but now arguing that Section 203 may constitutionally be applied to issue ads like WRTL's. But that argument merely begs the ultimate question whether WRTL's ads function as election advocacy.

Second, WRTL rehashes its argument that as-applied challenges are too burdensome to protect speech effectively. Br. 65-67. But WRTL identifies no case in which a court has found that a statute is not overbroad, yet struck it down because of the risk that as-applied challenges would not provide adequate protection in the small number of hypothetical cases as to which application of the statute might be improper. To the contrary, all the cases WRTL invokes reaffirm that where a statute is not substantially overbroad, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assert-

edly, may not be applied." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973); *accord New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 15 (1988); *Virginia* v. *Hicks*, 539 U.S. 113, 124 (2003). This Court has endorsed the same principle in the campaign-finance context. *See Buckley*, 424 U.S. at 73-74 (refusing to adopt a "blanket exemption" to FECA's disclosure requirements for minor parties based on the fear that as-applied challenges would prove too burdensome). In any event, as discussed above, *see supra* Part III, there is no reason to believe that as-applied challenges, in practice, will prove overly burdensome or otherwise inadequate.

Finally, WRTL (Br. 48) and certain amici suggest that this Court should overrule *McConnell*'s holding sustaining Section 204 of BCRA, which makes Section 203's funding-source restrictions on electioneering communications applicable to non-profit corporations. *See* 540 U.S. at 209-211.[18] They contend that those restrictions cannot constitutionally be applied to non-profit advocacy organizations that finance electioneering communications through individual donations. The district court never reached that question, and it is not properly presented in this case, because WRTL accepted substantial contributions from business corporations to finance the very ads at issue here. *See* FEC SJ Ex. 3 at 143-145.

In any event, that argument, recycled from the *McConnell* litigation, should be rejected. This Court has long recognized that the PAC requirement may constitutionally be applied to non-profit advocacy groups as well as to business corporations and unions, in part because of the risk that such groups could serve as a conduit for unregulated corporate funds. *See, e.g., Beaumont*, 539 U.S. at 159-160; *Austin*, 494 U.S. at 664; *MCFL*, 479 U.S. at 264. That rationale does not apply where a political advocacy organization without share-

---

[18] Section 204 superseded Section 203(c)(2) of BCRA, which had provided an exception to the PAC requirement for 501(c)(4) groups that paid for electioneering communications "exclusively by funds provided directly by individuals who are United States citizens or nationals" or permanent residents. 2 U.S.C. § 441b(c)(2); *McConnell*, 540 U.S. at 209 & n.90.

holders accepts *no* money from business corporations or unions. *See MCFL*, 479 U.S. at 264. But Congress may constitutionally require organizations, like WRTL, that *do* accept corporate contributions to finance their election-related spending through a PAC consisting of funds donated by members specifically for that purpose and kept wholly distinct from funds raised and used for the organization's operating costs. *See, e.g.*, *McConnell*, 540 U.S. at 211; *NRWC*, 459 U.S. at 209-211. Because money is fungible, a contrary holding would permit an organization to solicit and accept new donations from business corporations or unions to fund its ordinary program activities, freeing up individual contributions that would otherwise be used for that purpose to fund its electioneering ads. As a practical matter, the corporate or union contributions would still be funding the ads. Such a separate regulatory scheme for 501(c)(4) organizations would also be significantly more complicated to police and administer. As discussed above, WRTL has made no showing that the PAC requirement is unduly burdensome on the facts here; indeed, it has for many years maintained a PAC and used it to fund election advocacy. It has provided no reason, not already considered and rejected in *McConnell*, to hold that the Constitution requires Congress to adopt an alternative and less effective means of pursuing its goals.[19]

CONCLUSION

This Court should reverse the district court's judgment and remand for the entry of summary judgment in favor of appellants.

---

[19] A number of amici make arguments specific to groups organized under Section 501(c)(3) of the Internal Revenue Code. Because WRTL, the plaintiff in this as-applied challenge, is a 501(c)(4) organization, this is not an appropriate case for considering issues relating to 501(c)(3) organizations.

Respectfully submitted,

ROGER M. WITTEN
SHANE T. STANSBURY
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

PRATIK A. SHAH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DANIELLE SPINELLI
BRENT BICKLEY
KEVIN WHELAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000

Additional Counsel Listed On Inside Cover

APRIL 2007